

Washington International Law Journal

Volume 17 | Number 1

1-1-2008

The Human Rights Costs of China's Arms Sales to Sudan—A Violation of International Law on Two Fronts

Stephanie L. Kotecki

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Human Rights Law Commons](#)

Recommended Citation

Stephanie L. Kotecki, Comment, *The Human Rights Costs of China's Arms Sales to Sudan—A Violation of International Law on Two Fronts*, 17 Pac. Rim L & Pol'y J. 209 (2008).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol17/iss1/9>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

THE HUMAN RIGHTS COSTS OF CHINA'S ARMS SALES TO SUDAN—A VIOLATION OF INTERNATIONAL LAW ON TWO FRONTS

Stephanie L. Kotecki[†]

Abstract: As an emerging world power, China has a crucial need for oil to meet its growing fuel consumption. It has invested heavily in Sudan, a country with extensive and productive oil reserves. However, this partnership has an ugly side. Sudanese militia groups, as well as government troops, have been committing gross human rights violations against residents of the Darfur region. Meanwhile, Chinese arms manufacturers have continued to export weapons and military equipment to Sudan, with the full knowledge of the Chinese government. Many of the weapons used to raid villages in Darfur were manufactured in China.

International norms have evolved to regulate the global arms trade. State usage of these norms and the general belief in their force both support the argument that these norms now qualify as customary international law. These potentially enforceable norms require that arms-trading nations implement and enforce strict export regulations on licenses for arms shipments, in order to keep those shipments from going to unstable destinations where there is a high risk that they will be used to perpetuate conflict or commit human rights abuses. China's arms trade to Sudan violates this standard and is arguably a violation of international law. China is also violating international law by aiding and assisting the government of Sudan in the commission of crimes against humanity. Sudan is committing human rights abuses against civilians in Darfur, which is an internationally wrongful act, and China is complicit by indiscriminately providing the arms that are used in the attacks. China should make the necessary changes to its arms export practices and regulations to align them with international law, and should immediately halt further arms shipments to Sudan.

I. INTRODUCTION

Armed men on horses, camels and vehicles came with Sudanese government soldiers and surrounded the village at midday. Two hours later, one . . . plane and two helicopters flew over the village and shot rockets. The attackers came into the houses and shot my mother and grandfather. The attack lasted for two hours and everything was burnt down in the village. Thirty-five people were killed during the attack—five women, 17 children and 13 men—and they were not buried.¹

[†] The author would like to thank Professor Joel Ngugi for his invaluable assistance and the *Journal* editorial staff for all their hard work and helpful insights.

¹ Amnesty Int'l, *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, AI Index AFR 54/139/2004, Nov. 16, 2004, at 12, available at <http://web.amnesty.org/library/index/engafsr541392004> [hereinafter *Arming Sudan*].

This story, reported by Darfur resident Adam Roum, whose village was attacked in June 2003, is just one example of the human rights violations that have occurred systematically in the Darfur region of Sudan in recent years.² Attacks often come from the sky, as Sudanese military helicopters drop bombs onto villages and farms.³ The aerial bombings frequently occur before or in conjunction with a ground attack by armed militia in all-terrain vehicles.⁴ Members of the state-controlled, heavily armed Janjaweed militia carry out these ground attacks.⁵ A study by the World Health Organization found that almost 27,000 violent deaths occurred in the Darfur region in 2004 (over 2000 per month).⁶

Since the 1990s, China has been one of the major global suppliers of military equipment and arms to Sudan.⁷ Documented reports note the sale of fifty Chinese-manufactured Z-6 helicopters to the Sudanese government, as well as the provision of technical repair services by Harbin Dongan Engine, a Chinese company.⁸ The small arms exported from China come in the form of rifles, shotguns, and handguns, according to United Nations (“UN”) Comtrade data.⁹ Implicated Chinese weapons manufacturers include Changhe Aircraft Industries and Dongfeng Aeolus.¹⁰

China’s interest in Sudan is not confined to the arms trade. China’s need for oil has grown rapidly in recent years, and it has invested in African oil exploration to meet that need.¹¹ Sudan is a primary focus of Chinese oil development, and China is far ahead of other nations in oil contracts there.¹² By 2005, China was buying fifty to sixty percent of Sudan’s oil exports,

² See The Int’l Comm’n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 3, U.N. Doc. S/2005/60 (Jan. 25, 2005), available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf [hereinafter *Report of the ICI on Darfur*].

³ *Arming Sudan*, *supra* note 1, at 10 (citing Oct. 2004 monthly briefing to the U.N. Security Council by U.N. Special Representative on Sudan Jan Pronk); see also Amnesty Int’l, *People’s Republic of China: Sustaining Conflict and Human Rights Abuses: The Flow of Arms Continues*, AI Index ASA 17/030/2006, June 11, 2006, at 18, available at <http://web.amnesty.org/library/index/engasa170302006> [hereinafter *Sustaining Conflict*] (describing several specific instances of air attack).

⁴ *Arming Sudan*, *supra* note 1, at 10.

⁵ *Report of the ICI on Darfur*, *supra* note 2, at 36.

⁶ GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, SMALL ARMS SURVEY 2005: WEAPONS AT WAR 236-37 box 9.2 (2005) [hereinafter *Small Arms Survey 2005*].

⁷ *Arming Sudan*, *supra* note 1, at 17.

⁸ *Id.* (citing *NIF and SPLA Carve Up Sudan*, JANE’S INTELLIGENCE REVIEW, Jan. 7, 1998; AVIATION WEEK & SPACE TECHNOLOGY JOURNAL, available at www.aviationnow.com/content/publication/awst/2001outlook/aw347.htm (link provided by Amnesty International requires member login and password for online access.)).

⁹ *Arming Sudan*, *supra* note 1, at 30.

¹⁰ *Sustaining Conflict*, *supra* note 3, at 18-19.

¹¹ *China-Africa Trade Jumps by 39 Percent*, BBC NEWS, Dec. 29, 2006, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/business/4587374.stm>.

¹² *Id.*

fulfilling seven percent of its own consumption needs.¹³ China has invested over eight billion dollars in joint exploration contracts in Sudan.¹⁴ As recently as July 2007, a major Chinese oil company reached an agreement allowing it to search for oil off the coast of Sudan and to own a stake in production for the next twenty years.¹⁵ The state-owned China National Offshore Oil Corporation (“CNOOC”) is a major presence with 10,000 Chinese workers in the country.¹⁶

China’s financial interests in the country may contribute to its tolerant stance regarding Sudan’s human rights record in Darfur.¹⁷ China began investing in Sudan’s oil fields around the same time that other nations were breaking off diplomatic ties with the country due to its human rights abuses.¹⁸ China has been a consistent ally to Sudan in the international debate over the situation in Darfur.¹⁹ Human Rights Watch reports that China provided financial and military support to the Sudanese government during periods of ethnic cleansing in Darfur.²⁰ China also used its position on the Security Council to vigorously oppose UN-proposed sanctions against Khartoum.²¹

The situation in Darfur highlights the problem of the international arms trade to conflict regions. Despite global awareness of the humanitarian crisis in Darfur, China continues to provide military equipment to the government of Sudan.²² The weapons sent from China to Sudan do not appear to travel through illicit channels, because China reports these shipments to the UN Comtrade.²³ If the Chinese government gave export licenses to these shipments, it effectively provided its stamp of approval.

¹³ *Africa: China’s Great Leap Into the Continent*, IRINNEWS.ORG, Mar. 23, 2006, <http://www.irinnews.org/report.aspx?reportid=58530> [hereinafter *China’s Great Leap*].

¹⁴ *Id.*

¹⁵ *China to Search for Oil in Sudan*, BBC NEWS, July 2, 2007, <http://news.bbc.co.uk/2/hi/business/6261418.stm>.

¹⁶ *China’s Great Leap*, *supra* note 13, at 2.

¹⁷ It is interesting to note that China’s investment in Sudan’s oil resources has provided the government with a significant cash flow, enabling Sudan to use its new oil wealth to purchase expensive military equipment from Chinese manufacturers. *Arming Sudan*, *supra* note 1, at 39-40.

¹⁸ *See generally* *China’s Great Leap*, *supra* note 13.

¹⁹ Michael Vatikiotis, *Oil Lust in the Face of Genocide*, FAR E. ECON. REV., Oct. 7, 2004, Vol. 167, Iss. 40, at 20.

²⁰ *China’s Great Leap*, *supra* note 13, at 2.

²¹ Vatikiotis, *supra* note 19.

²² China’s shipment of military equipment to Sudan is documented as early as 1996. *See Arming Sudan*, *supra* note 1, at 17. In 2003, China was still Sudan’s major arms supplier, according to UN Comtrade data. *See* GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, SMALL ARMS SURVEY 2006: UNFINISHED BUSINESS 77 table 3.2 (2006). *See also* *China, Russia Deny Weapons Breach*, BBC NEWS, May 8, 2007, <http://news.bbc.co.uk/2/hi/africa/6632959.stm> (reporting claims that photographic evidence shows that China has continued since 2005 to ship arms to Sudan, which are then sent to Darfur).

²³ *See Arming Sudan*, *supra* note 1, at 30 n.86.

Although the human rights abuses taking place in Sudan are well-known in the international community,²⁴ the instability and conflict within the country do not appear to prevent Chinese export regulators from approving license applications for arms shipments to that area. Thus, the “legitimate” trade in arms between the two countries is serving to prolong and worsen the humanitarian crisis in Darfur.

Despite the trade benefits of China’s relationship with Sudan, China cannot afford to continue turning a blind eye to the crisis in Darfur. China’s arms trade to Sudan violates international law on two levels: 1) As a primary actor, China fails to adequately regulate arms exports to a conflict region, and 2) as a secondary actor, it is aiding and assisting the government of Sudan in the commission of crimes against humanity. China’s actions are placing the country at risk of international legal sanction. To avoid this possibility, China should tighten its export license controls so that shipments of small arms and conventional weapons to Sudan are not authorized indiscriminately. China’s export regulations are too vague, relying heavily on the discretion of those who are granting licenses, and must be more strictly implemented.

Part II of this Comment describes the components that are legally required for formation and recognition of a norm as customary international law. Part III argues that the international norm requiring export controls on arms shipments to conflict areas has attained the status of binding customary international law. Part IV demonstrates that China is violating this customary norm by inadequately controlling the export of arms from its manufacturers to conflict regions. Part V describes how the Articles of State Responsibility attribute responsibility for internationally wrongful acts to states that commit or assist in those acts. Part VI proposes that Sudan is committing internationally wrongful acts in Darfur, that China is providing assistance to Sudan in the form of arms and equipment, and that both nations are violating the Draft Articles of State Responsibility. Part VII recommends legislation and policy changes that would improve China’s adherence to international law.

II. INTERNATIONAL NORMS THAT SATISFY THE LEGAL REQUIREMENTS FOR CUSTOMARY INTERNATIONAL LAW HAVE BINDING FORCE

China is not party to any binding treaties that regulate the trade in small arms and military equipment of the type that is being exported to

²⁴ In 2004, UN member states discussed imposing sanctions on Sudan in response to the human rights crisis. See Vatikiotis, *supra* note 19.

Sudan.²⁵ However, the “hard law” found in treaties and multilateral agreements²⁶ is not the only source of international legal authority. Custom, general norms, and less-than-binding agreements, sometimes called “soft law,” can also have legal force.²⁷ This occurs when the international usage of the norms is adequately general and widespread to meet the two requirements of a formal definition of customary international law: usage and belief that the norm is binding.²⁸

Evidence of customary international law can be found in official statements and actions,²⁹ UN resolutions,³⁰ and multilateral agreements,³¹ even those that are not binding on all states.³² A norm that is recognized as customary international law is binding and can be enforced in court.³³

A. *Legal Norms Must Be Supported by States' General Usage and Opinio Juris to Qualify as Customary International Law*

Customary international law consists of a general practice among states that has been accepted as law.³⁴ This definition can be divided into two components: state usage, or patterns and practices of behavior, and *opinio juris*, the belief or expectation that the norm is legally binding.³⁵

²⁵ China is signatory to arms control treaties that regulate biological, chemical, and weapons of mass destruction (“WMD”) shipments, but does not participate in any treaties that cover small arms and conventional weapons. See Ministry of Foreign Affairs, List of Arms Control, Disarmament and Non-Proliferation Treaties that China has Joined, <http://www.fmprc.gov.cn/eng/wjzb/zzjg/jks/tyylb/t141338.htm> (last visited May 24, 2007).

²⁶ See Richard L. Williamson, Jr., *Is International Law Relevant to Arms Control?: Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT'L L. 59, 63 (2003).

²⁷ See *id.*

²⁸ Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L & COMP. L. 147, 148 (1995/1996).

²⁹ MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES* 50 (2d ed. 1997).

³⁰ Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 8-9 (1995/1996).

³¹ *Id.* See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(3) (1987).

³² Melissa Robbins, *Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 CAL. W. INT'L L.J. 275, 292-93 (2005).

³³ Lillich, *supra* note 30, at 17-18.

³⁴ Statute of the Int'l Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993.

³⁵ MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 130 (1999).

1. *General State Practice of a Norm Satisfies the Usage Requirement*

State practice consists of any official statement, action, or omission³⁶ made by a state in its international legal relations.³⁷ This can include diplomatic correspondence, legislation, or ratification of an international agreement.³⁸ Concrete actions taken by a state are weighed most heavily as evidence of state practice,³⁹ but statements also qualify as evidence of practice.⁴⁰ These can be verbal statements, such as reports to international organizations, or written text, such as press releases or policy statements.⁴¹

Usage or practice by only one state is not sufficient to meet the requirements of customary international law.⁴² Practice among states must be “uniform, extensive, and representative in character.”⁴³ A long history of general practice is not required.⁴⁴ As long as the practice is consistent, it can develop over a short period of time.⁴⁵

Although the practice of a norm must be representative, it does not have to be universal.⁴⁶ If it includes the states “whose interests are specially affected,” the norm is presumably representative.⁴⁷ An example of a situation where this would apply is a norm affecting states with nuclear capability.⁴⁸ Although the norm technically applies to all states, including those who have not yet developed nuclear capability, the practices of the states that do have the capability are the most important in showing that a norm exists.

In addition, all affected states do not have to consent to the norm. Even dissenting states can be bound by customary law,⁴⁹ the only exception being if a state “persistently and openly” dissents from the norm as it

³⁶ INT’L LAW ASS’N COMMITTEE ON THE FORMATION OF RULES OF CUSTOMARY (GENERAL) INT’L LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, arts. 4, 6 (2000), available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf> [hereinafter ILA STATEMENT OF PRINCIPLES].

³⁷ *Id.* commentary to art. 1(b)(1).

³⁸ The Int’l Law Comm’n, *Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth Session, Supplement No. 12, 368, 370-72, U.N. Doc. A/1316 (1950).*

³⁹ ILA STATEMENT OF PRINCIPLES, *supra* note 36, commentary to art. 3.

⁴⁰ *Id.* art. 4.

⁴¹ *Id.* commentary to art. 4.

⁴² *See id.* art. 12(i).

⁴³ *Id.*

⁴⁴ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 7 (6th ed. 2003).

⁴⁵ *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 42 (Feb. 20).

⁴⁶ ILA STATEMENT OF PRINCIPLES, *supra* note 36, art. 14(i).

⁴⁷ *See North Sea Continental Shelf*, 1969 I.C.J. at 43.

⁴⁸ VILLIGER, *supra* note 29 at 31.

⁴⁹ Paust, *supra* note 28, at 152.

develops.⁵⁰ In the same vein, treaties and international agreements can have the force of customary law, even for countries that are not party to them, when the principles of the treaty have general application and are widely accepted.⁵¹

2. *A General Belief in the Binding Nature of a Norm Satisfies the Opinio Juris Requirement*

Opinio juris is a legal term for the subjective requirement of legal belief in a customary international law.⁵² The Statute of the International Court of Justice (“ICJ”) states that customary norms must be practices that are “accepted as law.”⁵³ A norm is authoritative if states believe that it creates a legal obligation and that violation of the norm would result in sanction.⁵⁴ The belief or legal expectation of one state is not determinative; rather, the binding nature of the custom comes from the shared norms and expectations of the international community of states.⁵⁵

Evidence of a state’s belief in the legality of the custom can be found in official statements about the binding nature of a rule, or in UN votes and official statements.⁵⁶ Evidence of *opinio juris* can also be inferred from consistent state action or material practice.⁵⁷

The International Law Association’s (“ILA”) Statement of Principles Applicable to the Formation of General Customary International Law claims, contrary to traditional doctrine, that belief is not *necessary* for the formation of the law.⁵⁸ Thus, the belief prong of customary international law is arguably the less crucial one, because customary law can form as a result of consistent state practice even if states do not explicitly express a belief in the binding nature of the norm.⁵⁹ However, a showing of legal belief strengthens the argument that a customary international norm exists because

⁵⁰ ILA STATEMENT OF PRINCIPLES, *supra* note 36, art. 15.

⁵¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(3).

⁵² Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 141 (2005).

⁵³ Statute of the Int’l Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993

⁵⁴ VILLIGER, *supra* note 29, at 48.

⁵⁵ Paust, *supra* note 28, at 151.

⁵⁶ VILLIGER, *supra* note 29 at 51.

⁵⁷ Guzman, *supra* note 52, at 149.

⁵⁸ ILA STATEMENT OF PRINCIPLES, *supra* note 36, art. 16.

⁵⁹ There are exceptions in certain circumstances where the conduct of the state does not by nature give rise to an expectation of legal authority. This exception includes actions that are outside the realm of a state’s international legal relations or those that are generally understood to be non-binding in nature. *See id.* art. 17.

general belief in a norm's legal obligation qualifies as proof of customary law.⁶⁰

B. The ICJ's Definition of Customary International Law Includes New Sources of Evidence for State Practice and Belief, Such as International Agreements and Policy Declarations

The ICJ Statute is the authoritative source for the definition of customary international law, but it does not specifically define the elements of usage and legal belief. The precise components of customary international law are subject to much debate,⁶¹ but scholars of international law seem to agree that the definition of these components is a developing concept.⁶² Much of the debate centers on the types of evidence that are sufficient to show that a law has formed.⁶³ Traditionally, a determination of customary international law relied primarily on state action as evidence of a general custom.⁶⁴ The modern concept of the doctrine is broader, and includes official declarations, policy statements, resolutions, and treaties as valid sources of evidence.⁶⁵

Opinions from the ICJ shed light on this point. In a seminal early ICJ holding that addressed customary international law, the Court focused primarily on state actions as proof of a state's belief in the binding nature of a custom.⁶⁶ However, the Court's analysis in modern cases has been broader and has not been confined to this narrow interpretation.⁶⁷ The ICJ's more recent examinations of state practice look at state declarations, UN documents, and treaties.⁶⁸ This method of inquiry implies that proof of consistent state action is not always required for a finding of customary law. More recent decisions follow this line of reasoning and apply a broad definition of state practice that includes UN documents and participation in non-binding international conventions, such as the Geneva Conventions⁶⁹

⁶⁰ *Id.* art. 16.

⁶¹ Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 759-60 (2001).

⁶² Beth Stephens, *Litigating Customary International Human Rights Norms*, 25 GA. J. INT'L & COMP. L. 191, 198 (1995/1996).

⁶³ J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 454-55 (2000).

⁶⁴ Guzman, *supra* note 52, at 149.

⁶⁵ Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 817 (2005).

⁶⁶ See *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 41-44 (Feb. 20).

⁶⁷ Meron, *supra* note 65, at 819.

⁶⁸ *Id.* at 820.

⁶⁹ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 113 (June 27).

and the Vienna Convention on Diplomatic Relations,⁷⁰ as evidence of customary law. Thus, ICJ holdings allow for a broad and flexible analysis of state practice and belief, in which official statements and professed support of non-binding agreements qualify as evidence of customary international law.

III. EVIDENCE EXISTS OF AN INTERNATIONAL ARMS EXPORT CONTROL NORM THAT MAY QUALIFY AS BINDING CUSTOMARY LAW

The international instruments that set guidelines for arms-trading countries all specify that strict export license regulations are necessary in order to maintain global security and to prevent arms from accumulating in regions where they will have destabilizing or harmful effects.⁷¹ Consistently, the central premise of these agreements is that nations that export arms must implement and enforce regulations that adequately control the transfer of arms.⁷²

This section synthesizes the major international instruments to formulate a strong and coherent norm requiring export controls on arms transfers, and shows that this norm has attained customary international law status. The international requirement is supported both by state practice and by the belief of states in its legal force.⁷³ The negotiation, ratification, and implementation of multilateral agreements by most arms-exporting states are evidence of state practice. Official statements and UN votes qualify as legal belief.⁷⁴ Assuming that this evidence is adequate to prove the existence of customary law, China is bound by it, even though it has not participated in its development to the same extent as other nations. China has full knowledge of the norm, and officially supported it during its development instead of dissenting.⁷⁵

A. *Consistent Evidence of the Customary Norm Is Found in Several Multilateral Agreements and UN Actions*

The UN, as well as groups of arms-exporting nations, have instituted programs and ratified multilateral agreements to establish norms that regulate international arms shipments. These norms are contained in the

⁷⁰ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 21 (Feb. 14).

⁷¹ See *infra* Part III.A.

⁷² See *infra* Part III.A.4.

⁷³ See *infra* Part III.B.

⁷⁴ VILLIGER, *supra* note 29, at 51.

⁷⁵ See *infra* Part III.B.3.

United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (“UN PoA”),⁷⁶ in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (“Wassenaar Arrangement”),⁷⁷ and in the Organization for Security and Co-operation in Europe Document on Small Arms and Light Weapons (“OSCE Document”).⁷⁸ These sources all focus on the need for a cooperative effort to ensure global stability by regulating export procedures in such a way that weapons are prevented from falling into the hands of regimes and individuals who commit human rights violations.⁷⁹

1. The UN PoA Provides International Arms Trade Standards for Member Nations to Implement

The UN PoA is an agreement by member nations to implement actions on both a national and international level that endeavor to prevent and eliminate the illicit global trade in small arms and light weapons.⁸⁰ It was formulated by a UN Conference in July 2001.⁸¹ The General Assembly officially adopted the PoA at the end of the same year and decided to review progress made by member states five years later.⁸²

The Preamble of the UN PoA recognizes that “the illicit trade in small arms . . . sustains conflicts [and] exacerbates violence”⁸³ and that “[g]overnments bear the primary responsibility for preventing, combating and eradicating [this trade].”⁸⁴ The member states resolve to take action to prevent and combat the illicit trade in small arms and light weapons (“SALW”).⁸⁵ In Section II, the UN PoA presents actions that member states

⁷⁶ Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, U.N. Doc. A/CONF.192/15 (2001), available at <http://disarmament.un.org/cab/poa.html> [hereinafter UN PoA].

⁷⁷ Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, *Guidelines & Procedures, Including the Initial Elements* (July 12, 1996), available at <http://www.wassenaar.org/publicdocuments/Guidelines.doc> [hereinafter Wassenaar Arrangement Guidelines].

⁷⁸ Organization for Security and Co-operation in Europe [OSCE], *OSCE Document on Small Arms and Light Weapons*, OSCE Doc. FSC.JOUR/314 (Nov. 24, 2000), available at http://www.osce.org/documents/fsc/2000/11/1873_en.pdf [hereinafter OSCE Document].

⁷⁹ See *infra* Part.III.A.4.

⁸⁰ UN PoA, *supra* note 76, sec. I, art. 22.

⁸¹ See *id.* sec. I, art. 1 (referencing Conference on the Illicit Traffic in Small Arms and Light Weapons in All Its Aspects meeting in New York, July 9-20, 2001).

⁸² G.A. Res. 56/24, art. V, U.N. Doc. A/Res/56/24 (Dec. 24, 2001).

⁸³ UN PoA, *supra* note 76, sec. I, art. 5.

⁸⁴ *Id.* sec. I, art. 13.

⁸⁵ *Id.* sec. I, art. 22(a)-(e).

agree to take at the national, regional, and global levels. Of particular interest to the topic at hand are Sections II(2), (11), and (12), which deal with regulation of arms production and the need for nations to implement comprehensive and effective export licensing regulations. Section II(2) states that at the national level, member nations undertake to implement laws and administrative regulations that are sufficient to maintain control over the export of small arms.⁸⁶ In Section II(11), states are expected to process export authorizations using strict regulations and procedures that prevent the illicit trade in weapons, consistent with their “existing responsibilities” under international law.⁸⁷ Section II(12) reiterates the importance of state laws and regulations that control arms exports, and maintains that effective legal and enforcement measures are important components of this control.⁸⁸

2. *The Wassenaar Arrangement Is a Multilateral Agreement Between Many of the Major Arms-Exporting States That Provides Standards for Export Controls*

The Wassenaar Arrangement is an international agreement that is intended to “complement and reinforce” existing export controls for arms, and for products and technologies that can be used as arms.⁸⁹ Forty states are party to the agreement.⁹⁰ Most of them are in Europe, but Korea, Japan, the United States, and South Africa are also signatories.⁹¹ The agreement was ratified in 1996⁹² for the purpose of contributing to international security by preventing transfers of arms that result in destabilization of a country or region.⁹³ The procedures require that states use “maximum restraint as a matter of national policy when considering applications for the export of arms . . . to all destinations where the risks are judged greatest, in particular to regions where conflict is occurring.”⁹⁴

⁸⁶ *Id.* sec. II, art.2.

⁸⁷ *Id.* sec. II, art. 11.

⁸⁸ *Id.* sec. II, art. 12.

⁸⁹ Wassenaar Arrangement Guidelines, *supra* note 77, sec. I, art. 2.

⁹⁰ Wassenaar Arrangement, Participating States, <http://www.wassenaar.org/participants/index.html> (last visited Feb. 7, 2007).

⁹¹ *Id.*

⁹² Wassenaar Arrangement, F.A.Q., <http://www.wassenaar.org/faq/index.html> (last visited Feb. 7, 2007).

⁹³ Wassenaar Arrangement Guidelines, *supra* note 77, sec. I, arts. 1-3.

⁹⁴ *Id.* sec. IV, art. 2.

In 2002, the Wassenaar Arrangement was amended to include an appendix that deals specifically with the export of SALW.⁹⁵ The Best Practice Guidelines for Exports of Small Arms and Light Weapons (“Best Practice Guidelines”), which was adopted by a plenary of member states, retains the themes set forth in the original agreement on conventional weapons, applying them specifically to SALW.⁹⁶ The guidelines stipulate that states will take into account certain factors as they evaluate export license applications for SALW, including a clear risk that the arms will be used to prolong an existing armed conflict,⁹⁷ endanger peace or contribute to regional instability,⁹⁸ or “for the violation or suppression of human rights and fundamental freedoms.”⁹⁹

3. *The OSCE Document on SALW Is Another Important Multilateral Agreement That Focuses on Export Controls*

The Organization for Security and Co-operation in Europe, a regional security organization comprising fifty-six participating states,¹⁰⁰ articulates the norms agreed upon by European arms-exporting states. These states adopted an agreement on SALW in November of 2000.¹⁰¹ Although only European and North American states are party to the OSCE, these countries make up the majority of global arms producers and exporters.¹⁰² The OSCE Document contains many of the same themes as the Wassenaar Arrangement. These include recognition of the destabilizing effect of arms transfers to conflict areas¹⁰³ and the need to develop export control procedures that account for the situation in destination countries.¹⁰⁴

⁹⁵ Wassenaar Arrangement, Best Practice Guidelines for Exports of Small Arms and Light Weapons (Dec. 12, 2002), <http://www.wassenaar.org/guidelines/GuidelinesDocs/SALW.doc> [hereinafter Best Practice Guidelines].

⁹⁶ *Id.*

⁹⁷ *Id.* sec. I(2)(e).

⁹⁸ *Id.* sec. I(2)(f).

⁹⁹ *Id.* sec. I(2)(i).

¹⁰⁰ The Organization for Security and Co-Operation in Europe, <http://www.osce.org> (last visited Oct. 15, 2007).

¹⁰¹ OSCE Document, *supra* note 78.

¹⁰² From 2002-2005, 90% of the total global arms sales were supplied by the United States and European nations. See Global Issues, *The Arms Trade is Big Business*, “Arms Sales by Supplier Nations” chart, <http://www.globalissues.org/Geopolitics/ArmsTrade/BigBusiness.asp> (last visited Apr. 17, 2007) [hereinafter Global Issues] (based on data from RICHARD F. GRIMMETT, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS, 1998-2005 2 (2006), available at <http://www.fas.org/sgp/crs/weapons/RL33696.pdf>).

¹⁰³ OSCE Document, *supra* note 78, sec. I(1).

¹⁰⁴ *Id.* sec. III, A-B.

The OSCE Document devotes considerable detail to export criteria and controls.¹⁰⁵ The first factor to be considered when reviewing a license application is the recipient country's record on human rights and fundamental freedoms.¹⁰⁶ Licenses should be denied to recipients when there is a clear risk that they will use the arms to violate or suppress human rights,¹⁰⁷ to prolong conflict or endanger peace,¹⁰⁸ or to repress civilians.¹⁰⁹ The procedures must be sufficient to allow the state "to retain adequate control over such transfers."¹¹⁰

4. *These Agreements Are Consistent and Articulate a Specific Norm*

The standards set forth in the multilateral agreements described above can be synthesized into a consistent norm. They contain very similar objectives, themes, and requirements. Although they are not identical, the recurring similarities and the overall consistency in these varied agreements support the argument that a strong, consistent, and specific norm has emerged.

The central objective of the agreements is to increase global security and stability by establishing effective state control over the international transfer of small arms and conventional military equipment.¹¹¹ All of the agreements encourage cooperation and the transfer of information between states, but place the responsibility on individual nations to implement internal policies and regulations that will stem the flow of arms to unstable regions or inhumane governments.¹¹²

Export controls are a crucial tool addressed in each of the agreements.¹¹³ Specifically, member nations agree to exercise strict control over the transfer of arms across their borders. License applications must be reviewed in light of the stability and human rights record of the recipient country. Licenses should be denied when shipments are destined for areas where there is a high risk that the arms will be used to perpetuate conflict,

¹⁰⁵ *Id.* sec. III.

¹⁰⁶ *Id.* sec. III.A.2(a)(i).

¹⁰⁷ *Id.* sec. III.A(2)(b)(i).

¹⁰⁸ *Id.* sec. III.A(2)(b)(v) and (vi).

¹⁰⁹ *Id.* sec. III.A(2)(b)(viii).

¹¹⁰ *Id.* sec. III.B(2).

¹¹¹ *See supra* Part III.A.1-3.

¹¹² *See, e.g.,* UN PoA, *supra* note 76, sec. I, art. 13 (stating that governments bear the primary responsibility for implementing the provisions of the PoA).

¹¹³ *See, e.g.,* Wassenaar Arrangement Guidelines, *supra* note 77, sec. IV, art. 2 (providing that participating states have agreed to follow best practice guidelines for export controls on small arms).

repression, or human rights abuses. Simply enacting these regulations is not enough, however. They also must be strictly enforced.

Thus, a global norm can be articulated. There is an expectation in the international community that arms-exporting states will regulate and enforce export-licensing requirements that restrict arms transfers to conflict areas and/or to human rights abusers. The implementation of this norm begins on a national level, but must also be supported by international consistency and cooperation in order to maintain global security and stability and to protect human rights.

B. If State Practice and Belief in the Legality of This Norm Constitute Customary International Law, It Is Binding on China

The evidence demonstrates that international custom requires strict export controls on global arms transfers. Participation in the UN PoA by member states shows both a belief in the objectives of the PoA, and an intent to implement its directives in practice. Ratification of international instruments, such as the Wassenaar Arrangement, or regional instruments, such as the OSCE Document, provides evidence of state practice. In addition, official policy statements and UN votes indicate a general belief among arms-exporting states that an enforceable norm has been established. China did not participate fully in the development of the customary norm, but may still be bound by it because it did not dissent as the potential law developed.¹¹⁴

1. Participation in Multilateral Nonproliferation Agreements Is Evidence That General State Practice of Export Control Norms Exists

The Wassenaar Arrangement fits squarely within the ICJ's definition of state practice¹¹⁵ because it is an international instrument that was negotiated and ratified by a large number of states, including almost all of the world's major arms exporters.¹¹⁶ Member states agree to uphold the goals of the Arrangement by conforming their national export policies to its

¹¹⁴ See *infra* Part III.B.3.

¹¹⁵ See *supra* Part II.A.1.

¹¹⁶ Note that in 2002, the top seven exporters of small arms in the world were the U.S., Italy, Brazil, Germany, Belgium, the Russian Federation, and China. SMALL ARMS SURVEY 2005, *supra* note 6, at 98. All of these nations except for Brazil and China are signatories to the agreement. The Wassenaar Arrangement: Participating States, <http://www.wassenaar.org/participants/index.html> (last visited Feb. 7, 2007).

directives.¹¹⁷ The Arrangement stipulates that participating states should attempt to further its goals through their national policies in order to support global security.¹¹⁸

The OSCE Document is a regional instrument that mirrors many of the provisions of the Wassenaar Arrangement.¹¹⁹ Although it cannot be used as evidence of global norms, it is a good indication of the norms accepted by European and North American states, regions that include most major arms exporters. Like the Wassenaar Arrangement, it qualifies as state practice because of its ratification by signatory states. Taken in their totality, these two agreements are representative of the customary norm that has emerged to regulate arms exports.

Although recent in its development, state practice of the export control norm has been consistent for the past five to ten years. A majority of states have voiced their belief in a standardized system for control of the arms trade through export licensing and monitoring. In addition, a number of arms-exporting states reported to the UN that they have assessed and improved their arms laws and export regulations.¹²⁰ The effectiveness of these policies is illustrated by the fact that most major exporters do not sell arms to Sudan.¹²¹

It should be noted at this point that although the international instruments that describe the norms for arms exports have not been ratified by the majority of nations worldwide, they are still indicative of general global practice. When a norm specially affects only certain states, the practices of those states are the most important in determining customary international law.¹²² The law that develops, however, binds all states.¹²³ Only a handful of nations manufacture and export most of the weapons that are traded in the international market,¹²⁴ so it is the practices of these nations that must be examined most carefully. Nearly all of these countries participate in the UN PoA, the Wassenaar Arrangement, and the OSCE Document. China is a notable exception, as one of only two top arms-

¹¹⁷ Wassenaar Arrangement Guidelines, *supra* note 77, sec. I, art. 1. Note that this is a political instrument, not a legal one, so the commitments made by member states are aspirational. *See* sec. II, art. 3.

¹¹⁸ *Id.* sec. I, art. 1.

¹¹⁹ *See supra* Part III.A.3.

¹²⁰ ELLI KYTÖMÄKI & VALERIE YANKEY-WAYNE, UNITED NATIONS INSTITUTE FOR DEVELOPMENT RESEARCH, FIVE YEARS OF IMPLEMENTING THE UN PROGRAMME OF ACTION ON SMALL ARMS AND LIGHT WEAPONS: REGIONAL ANALYSIS OF NATIONAL REPORTS 182 (2006) [hereinafter FIVE YEARS OF THE POA].

¹²¹ According to UN Comtrade data, China is the only country exporting significant numbers of small arms to Sudan. *See* SMALL ARMS SURVEY 2005, *supra* note 6, at 102-05, tbl. 4.1.

¹²² VILLIGER, *supra* note 29 at 30-31.

¹²³ *Id.*

¹²⁴ Global Issues, *supra* note 102.

exporting countries¹²⁵ that is not a signatory of the latter two multilateral agreements. The practices of the majority of arms-exporting states provide sufficient evidence from which to draw an international norm.

2. *The Actions of the Member States Participating in the UN PoA Show State Practice and Belief in a Legal Norm for Export Controls*

The UN PoA, which urges member states to take responsibility for controlling the global flow of arms,¹²⁶ also qualifies as evidence of customary international law. General Assembly votes and statements by member countries are often classified as evidence of legal belief in a norm,¹²⁷ and ICJ decisions indicate that they can even rise to the level of state practice.¹²⁸ The PoA was established by passage of a UN resolution in 2001, with the majority of member states voting in approval.¹²⁹ This strong support for the PoA indicates a general belief among nations that states are to take action to control the arms trade. The member states showed a unified front on the issue by agreeing to implement the specific provisions of the Programme in order to prevent the flow of arms to conflict regions. Although the PoA is a fairly recent development, this does not diminish its importance as evidence of customary law, since customary norms can develop in short periods of time as long as they are consistent among states.¹³⁰

The UN is collecting status updates on the implementation of the PoA through periodic conferences where nations report their activities and level of compliance.¹³¹ Many nations have made progress in the first five years of the PoA. The majority of UN member nations, 137 out of 192 countries, have submitted reports on their progress.¹³² Over eighty percent of reporting nations have addressed their national export and transfer controls in response to the PoA's recommendations.¹³³ Actual implementation of PoA directives goes beyond mere statements, and qualifies as strong evidence of state practice, as well as a general belief that the custom is legally required.

¹²⁵ SMALL ARMS SURVEY 2005, *supra* note 6, at 98. *See also supra* note 116 (noting that China and Brazil are the only two nations among the top seven exporters of small arms that are not signatories to the Wassenaar Arrangement).

¹²⁶ UN PoA, *supra* note 76, sec. I, art. 13.

¹²⁷ VILLIGER, *supra* note 29 at 51.

¹²⁸ *See supra* Part.II.B.

¹²⁹ G.A. Res. 56/24, art. V, U.N. Doc. A/Res/56/24 (Dec. 24, 2001).

¹³⁰ VILLIGER, *supra* note 29, at 45.

¹³¹ UN PoA, *supra* note 76, sec. IV, art. 1.

¹³² FIVE YEARS OF THE POA, *supra* note 120, at xviii.

¹³³ *Id.*

3. *China's Policy Statements and Legislative Actions Provide Evidence of Its Knowledge of and Belief in the International Custom, While There Is No Indication of Official Dissent*

China never officially dissented to the export control norm. In fact, China explicitly declared its support for the UN PoA. In a statement to the 2006 UN Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, the Chinese Ambassador to the UN stated that China actively participates in the Programme's objectives.¹³⁴ He claimed that China has established "relatively comprehensive domestic legislation," and that its export controls "match international practices, including the licensing system for SALW export."¹³⁵ He also promised that "China will continue to actively participate in the PoA review process in a constructive manner and is ready to exchange experience and promote cooperation with other parties during the process, in a joint effort to move forward the multilateral process of combating the illicit trade in SALW."¹³⁶

In addition to statements made to the UN, an internal Chinese policy directive on arms control affirms that "China is committed to properly addressing humanitarian issues in the arms control field"¹³⁷ and explained that in order to do so, the government will base its policies on the goal of maintaining national security and global stability.¹³⁸ These official statements show a lack of dissent on China's part, because it has full knowledge of the international norms and maintains that its policy is to comply with them. Although statements by an individual nation in support of a norm do not make it binding, these statements do lead to the inference that China recognizes the binding nature of the proposed customary law.

¹³⁴ H.E. Ambassador Zhang Yishan, Statement by H.E. Ambassador Zhang Yishan Head of the Chinese Delegation and Deputy Permanent Representative of China to the U.N. at the Preparatory Committee for the U.N. Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in SALW in All Its Aspects (Jan. 9, 2006), available at <http://www.fmprc.gov.cn/eng/wjz/zjg/jks/kjfywj/t230238.htm> [hereinafter Statement by Ambassador Yishan].

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ INFORMATION OFFICE OF THE ST. COUNCIL, CHINA'S ENDEAVORS FOR ARMS CONTROL, DISARMAMENT, AND NON-PROLIFERATION at II (2005), in WHITE PAPERS OF THE CHINESE GOVERNMENT, available at <http://www.china.org.cn/english/features/book/140320.htm>.

¹³⁸ *Id.*

IV. CHINA'S EXPORT CONTROL LAWS ALLOW ARMS SHIPMENTS TO SUDAN AND VIOLATE A POTENTIALLY BINDING CUSTOMARY NORM

China's export controls do not meet the customary international standard as set forth in the UN PoA and the Wassenaar and OSCE agreements. The customary norm that requires strict export controls on arms shipments to conflict areas may now have the force of international law, for it is sufficiently supported by evidence of state practice and belief.¹³⁹ China's licensing regulations for arms exports are not adequate under this international standard. Although some of the language in China's export regulations contains similarities to the Wassenaar Arrangement language, there are significant gaps between Chinese practices and international standards.¹⁴⁰ The enacted export regulations are too vague and do not restrict licenses in the manner required by international law. In addition, China has failed to adequately implement both its own legal standards and the more stringent international standards.

A. *China's Export Laws Give Broad Discretion to License Administrators and Contain Limited Restrictions Regarding Destination Countries*

China's export regulations are found in the Regulations of the People's Republic of China ("PRC") on Administration of Arms Export.¹⁴¹ Article 4 explicitly asserts that the state has control over the management of arms exports, the power to prevent shipments that would be damaging to security, and the responsibility to ensure the lawful exercise of export controls.¹⁴² Article 5 contains three principles that determine whether an arms shipment is appropriate: 1) the arms should be useful to the self-defense capability of the recipient country, 2) they should not threaten regional or international peace and stability, and 3) the exports should not interfere with the internal affairs of the recipient country.¹⁴³ Article 13 introduces the license system that applies these requirements.¹⁴⁴ Proposals for arms exports must be examined and approved according to the

¹³⁹ See *supra* Part IV.B.

¹⁴⁰ TO SUPPLY OR TO DENY: COMPARING NONPROLIFERATION EXPORT CONTROLS IN FIVE KEY COUNTRIES 141 (M.D. Beck et al. eds., 2003).

¹⁴¹ Regulations of the Administration of Arms Export (promulgated by the St. Council & the Central Ministry Commission, Aug. 15, 2002, effective Nov. 15, 2002), *translated in* GOV.CN, http://www.gov.cn/english/laws/2005-07/25/content_16975.htm (last visited Nov. 20, 2007) (P.R.C.) [hereinafter Regulations of the PRC].

¹⁴² *Id.* art. 4.

¹⁴³ *Id.* art. 5.

¹⁴⁴ *Id.* art. 13.

regulations, and the export of arms is dependent on obtaining a formal license.¹⁴⁵

These principles are vague and internally contradictory. In Article 5, although subsection (2) requires that licensing authorities consider the stability of the recipient region, it does not explicitly state that a finding of instability should result in denial of the application. It is also unclear how subsection (3), which advocates a policy of non-interference in internal affairs, might apply when there is internal conflict and instability. Because the regulations do not give explicit direction for how the general principles in Article 5 are to be applied when evaluating an export license application, they give a great deal of discretion to individual license administrators. This means that the state is not in control of the process, despite the statement to the contrary in Article 4.

The Chinese regulations do not require denial of a license application even when there is a risk that the arms will be used to suppress fundamental freedoms or repress human rights.¹⁴⁶ Article 5(2) of the Chinese law addresses stability and security concerns, but makes no mention of human rights.¹⁴⁷ In fact, Section (3), which advocates a policy of non-interference in the internal affairs of the destination country,¹⁴⁸ leaves little room for analysis of a recipient government's human rights record.

B. China's Failure to Control Its Arms Exports to Sudan Through Adequate Controls and Licensing Regulations Is a Possible Violation of Customary International Law

China is violating international arms control norms by employing export regulations that are vague and incomplete by international standards. The prospective customary law described earlier in this Comment requires that arms-exporting states adequately control the shipments that leave their borders through strict export regulations.¹⁴⁹ Chinese regulations fall short of this standard because they allow for broad discretion and they lack specific standards. In addition, international custom requires that an exporting state prevent arms from being shipped to regions characterized by instability and human rights violations.¹⁵⁰ China's regulations do not explicitly control for

¹⁴⁵ *Id.*

¹⁴⁶ *See generally id.*

¹⁴⁷ *Id.* art. 5(2).

¹⁴⁸ *Id.* art. 5(3).

¹⁴⁹ *See supra* Part III.A.4.

¹⁵⁰ *Id.*

human rights violations in destination countries, and thereby fail to meet this requirement.

China's recurring approvals of arms shipments to Sudan confirm the weaknesses of the existing regulations. China is a primary international supplier of small arms and military equipment to Sudan.¹⁵¹ In Sudan, government forces are committing crimes against humanity,¹⁵² using weapons obtained from China. The fact that such large-scale arms shipments have made their way through China's export licensing system despite the human rights situation in Darfur indicates that the system does not meet the international standard.¹⁵³

V. THE ILC ARTICLES OF STATE RESPONSIBILITY HOLD STATES RESPONSIBLE FOR COMMITTING OR ASSISTING IN WRONGFUL ACTS

The Draft Articles on State Responsibility for Internationally Wrongful Acts ("Draft Articles on State Responsibility"),¹⁵⁴ adopted in 2001 by the International Law Commission ("ILC"), define how states can be held responsible for their international obligations.¹⁵⁵ Articles 1-3 address the general principles of state responsibility for internationally wrongful acts. Articles 4-11 discuss the attribution of conduct to a state. And Articles 16-19 define the responsibility of a state that is complicit with another state in wrongful actions.

There are two elements to the definition of an internationally wrongful act. That act must be attributable to the state, and it must constitute "a breach of an international obligation."¹⁵⁶ The wrongful act can be either an action or a failure to act when there is a duty to do so.¹⁵⁷ Article 3 stipulates

¹⁵¹ *Arming Sudan*, *supra* note 1, at 17.

¹⁵² *See infra*, Part VI.A.

¹⁵³ It is interesting to note that these shipments may even violate China's standards. The Chinese prohibition in Article 5(2) against exporting arms that will have a destabilizing effect should rule out shipments to Sudan, a country that is characterized by instability and internal conflict which has begun to spill over its borders into neighboring countries. *See* Regulations of the PRC, *supra* note 141.

¹⁵⁴ Report of the International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter *Draft Articles on State Responsibility*].

¹⁵⁵ *See generally id.* The Draft Articles are the culmination of 40 years of research and drafting on the parameters of state responsibility. Although they were drafted in treaty form and were an attempt to codify customary law, they are not legally binding as a source of law. However, they can be used as evidence of customary international law. *See* Daniel Bodansky, John R. Crook, & David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 861-62 and 867 (2002).

¹⁵⁶ *Draft Articles on State Responsibility*, *supra* note 154, art. 2(a)-(b).

¹⁵⁷ JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 82 (2002).

that international law, not internal law, governs the characterization of internationally wrongful acts.¹⁵⁸

Actions of a state are conducted by “organs” of the state.¹⁵⁹ This term covers any individual or entity that carries out governmental functions of the state, whether legislative, executive, judicial, or regulatory,¹⁶⁰ as long as they are acting within their official capacity.¹⁶¹ If a person or entity is not an “organ” of the state, but has been empowered to exercise governmental authority, those actions are also attributable to the state.¹⁶²

Finally, even the conduct of those without any governmental authority can be attributed to the state if they are acting under the control or instruction of the state. In *Nicaragua v. United States*, the ICJ determined that the United States did not have “effective control” over the activities of the Nicaraguan paramilitary forces accused of international crimes.¹⁶³ Because the United States was not giving them specific orders, it was not found liable for the wrongful acts they committed, despite its financial support of their activities.¹⁶⁴ However, in a more recent case from the International Criminal Tribunal on Yugoslavia, *Prosecutor v. Dusko Tadic*, the court diverged from the *Nicaragua* reasoning and used an “overall control” test to attribute the conduct of paramilitary actors to the state.¹⁶⁵ This definition of state control requires that the state finance and equip the militia, as well as generally coordinate its military aims, but does not require that direct orders be issued specifically for the wrongful conduct.¹⁶⁶

Article 16 of the Draft Articles on State Responsibility provides that a second state can be held responsible for aiding or assisting the first state in the internationally wrongful act.¹⁶⁷ This rule has given rise to the concept that complicity rather than direct control creates responsibility for an internationally wrongful act.¹⁶⁸ This Article is not invoked often, and there are no known cases of an international court holding a state responsible under Article 16 for its complicity in another state’s internationally wrongful

¹⁵⁸ Draft Articles on State Responsibility, *supra* note 154, art. 3.

¹⁵⁹ *Id.* art. 4.

¹⁶⁰ CRAWFORD, *supra* note 157, at 95.

¹⁶¹ *Id.* at 96, 99.

¹⁶² Draft Articles on State Responsibility, *supra* note 154, art. 5.

¹⁶³ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 65 (June 27) (finding the United States was “not responsible for the acts of the contras, but for its own conduct vis-a-vis Nicaragua, including conduct related to the acts of the contras”).

¹⁶⁴ *Id.*

¹⁶⁵ *Prosecutor v. Tadic*, Case No. IT-94-1-A ¶ 131 (July 15, 1999).

¹⁶⁶ *Id.*

¹⁶⁷ Draft Articles on State Responsibility, *supra* note 154, art. 16.

¹⁶⁸ Kate Nahapetian, *Confronting State Complicity in International Law*, 7 UCLA J. INT’L L. & FOR. AFF. 99, 101 (2002).

act. The ICJ addressed the issue of transnational state responsibility in its *Nicaragua v. United States* decision but did not explicitly provide for complicity as a violation of state responsibility.¹⁶⁹ However, the concept that complicity is a violation of international law has been applied in international relations on several occasions.¹⁷⁰

Article 16 requires that the state providing assistance know of the circumstances of the wrongful act and that the act would still be wrongful under international law if it were committed by the assisting state, rather than the primary state.¹⁷¹ It is unclear whether the rule requires intent on the part of the complicit state to assist in wrongdoing, or whether an action that results in furthering the wrongdoing, with or without intent, is sufficient.¹⁷²

VI. CHINA IS VIOLATING THE ARTICLES OF STATE RESPONSIBILITY BY PROVIDING AID AND ASSISTANCE TO SUDAN IN THE FORM OF WEAPONS

The internationally wrongful acts committed in Darfur are attributable to Sudan. It has taken inadequate action to prevent human rights violations committed by the military as an organ of the state, or non-governmental forces within its control such as the Janjaweed militias.¹⁷³ China is providing aid and assistance to Sudan by allowing the flow of arms from China to Sudan to continue, with the knowledge that the weapons are likely going into the hands of those committing the abuses.¹⁷⁴ This is a violation of international law under the Draft Articles on State Responsibility.

A. *Sudan's Actions in Darfur Are Internationally Wrongful Acts*

Under international law, the actions of the Sudanese military and the Janjaweed militia in Darfur are wrongful acts. The ILC Articles do not provide an enumerated list of wrongful actions, but the ICJ specified on more than one occasion that satisfying the two elements of Article 2

¹⁶⁹ Mark Gibney, Katarina Tomasevski, & Jens Vedsted-Hansen, *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 284 (1999).

¹⁷⁰ The Security Council Resolution prohibiting assistance to apartheid South Africa is one example. See Nahapetian, *supra* note 168, at 102-04.

¹⁷¹ Draft Articles on State Responsibility, *supra* note 154, art. 16.

¹⁷² Nahapetian, *supra* note 168, at 105-07.

¹⁷³ *Report of the ICI on Darfur*, *supra* note 2, at 6.

¹⁷⁴ See *China, Russia Deny Weapons Breach*, BBC NEWS, May 8, 2007, <http://news.bbc.co.uk/2/hi/africa/6632959.stm> (discussing Amnesty International's assertion that China is aware of the eventual use of arms exported to Sudan).

establishes legal responsibility for state action.¹⁷⁵ The evidence must show that the atrocities in Darfur are: 1) attributable to Sudan and 2) a breach of responsibility under international human rights law. According to the report prepared by the UN International Commission of Inquiry on Darfur, Sudanese government forces and Janjaweed militia are responsible for “serious violations of international human rights and humanitarian law amounting to crimes under international law.”¹⁷⁶ Specifically, these crimes include killing of civilians, destruction of villages, torture, rape, and forced disappearances,¹⁷⁷ acts which all fall into accepted categories of human rights violations under international law.¹⁷⁸

Actions carried out by organs of the state such as government military forces are attributable to the state.¹⁷⁹ After exhaustive research, the UN Commission of Inquiry concluded that Sudanese military forces have been committing violent acts against civilians in Darfur.¹⁸⁰ Even acts committed by non-governmental militia groups can be attributed to Sudan, as long as they were acting under the control or instruction of the government.¹⁸¹ This situation is analogous to the type of control attributed to the Yugoslavian government in the *Tadic* case.¹⁸² In that case, the militia groups that committed crimes against humanity were financed, armed, and organized by Yugoslavia.¹⁸³ The conclusions of the UN Commission of Inquiry show that the Sudanese government exercised this same level of overall control.¹⁸⁴

Finally, not only did the Sudanese government provide weapons and air support for the militia attacks, but it failed to protect innocent civilians within its borders from ongoing and repetitive attacks.¹⁸⁵ Its inadequate measures in response to the violence in Darfur created a “climate of almost total impunity for human rights violations.”¹⁸⁶ As noted above, states can be held liable for omissions as well as actions.¹⁸⁷

¹⁷⁵ See CRAWFORD, *supra* note 157, at 81, Commentary (2) (citing Phosphates in Morocco, Preliminary Objections, 1938 P.C.I.J. (ser. A/B) No. 74, at 10; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3, 29 (May 24)).

¹⁷⁶ Report of the ICI on Darfur, *supra* note 2, at 3.

¹⁷⁷ *Id.*

¹⁷⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §702(c), (d), and (g).

¹⁷⁹ See *supra* Part V.

¹⁸⁰ Report of the ICI on Darfur, *supra* note 2, at 3.

¹⁸¹ See *supra* Part V.

¹⁸² *Id.*

¹⁸³ *Prosecutor v. Tadic*, Case No: IT-94-1-A, ¶151 (July 15, 1999).

¹⁸⁴ Report of the ICI on Darfur, *supra* note 2, at 36.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 6.

¹⁸⁷ See *supra* Part V.

B. *China's Provision of Arms to Sudan Qualifies as "Aiding and Assisting" in an Internationally Wrongful Act*

China is complicit in the wrongful acts committed by the Sudanese forces because it provided aid and assistance in the form of arms shipments, with full knowledge that the weapons would likely be used to commit unlawful human rights abuses. As a primary supplier of military equipment to Sudan,¹⁸⁸ China's arms shipments assist Sudan in its military endeavors by arming its forces. As described above, the weapons are being used to commit human rights violations by military organs of the state and militias which are under the overall control of the state. Chinese weapons are crucial to the equation, and China can be held responsible for its assistance.

China's actions fall within the requirements of Article 16 of the Draft Articles on State Responsibility.¹⁸⁹ China's knowledge of the wrongful acts committed in Darfur can be assumed, since there is ample published evidence of the crimes. The UN Commission's report is the most authoritative record of the situation.¹⁹⁰ In addition, human rights organizations such as Amnesty International and Human Rights Watch have published comprehensive reports detailing the crimes as reported by local observers.¹⁹¹ Finally, media coverage and political discussion of the issue are extensive.¹⁹² The criminal nature of Sudan's actions satisfy the second prong of Article 16.¹⁹³ These acts would still be wrongful under international law if committed by any other state, including China.

VII. CHINA SHOULD AMEND ITS EXPORT REGULATIONS TO CONFORM WITH INTERNATIONAL LAW AND HALT SHIPMENTS OF ARMS TO SUDAN

Currently, China could be held responsible for violations of international law on more than one level. International sanctions are not automatic, and would depend on a suit being brought before the ICJ or in a national court under that nation's laws,¹⁹⁴ but China should take measures to avoid this possibility. Although China has a strong national interest in

¹⁸⁸ *Arming Sudan*, *supra* note 1, at 17.

¹⁸⁹ *See supra* Part V.

¹⁹⁰ *See generally Report of the ICI on Darfur*, *supra* note 2.

¹⁹¹ *See, e.g., Amnesty Int'l, Sudan: Sudan Government's Solution: Janjawid Unleashed in Darfur*, AI Index AFR 54/078/2006, Nov. 24, 2006, available at <http://web.amnesty.org/library/Index/ENGAFR540782006?open&of=ENG-SDN>; Human Rights Watch, *Darfur in Flames: Atrocities in Western Sudan*, Vol. 16, No. 5(A), April 2004, available at <http://hrw.org/reports/2004/sudan0404/>.

¹⁹² *See, e.g., Lydia Polgreen, Civilians Bear Brunt of the Continuing Violence in Darfur*, N.Y. TIMES, Jan. 24, 2005, at A3.

¹⁹³ Draft Articles on State Responsibility, *supra* note 154, art. 16.

¹⁹⁴ BROWNLEE, *supra* note 44, at 47.

maintaining positive relations with its oil suppliers, especially Sudan, it also should have a strong interest in protecting human rights and fundamental freedoms. These are valuable interests in their own right, but also can have a significant influence on China's international political standing. China's primary policy objective should be to support global security and stability, and it should not be willing to sacrifice human rights protections in exchange for fuel contracts.

A. *China Should Revise and Clarify Its Export Regulations in Accordance with International Customary Norms*

First, China needs to make changes to its regulation of exports and its oversight of export licensing. If arms shipments are more heavily regulated at the outset of the transfer process, they are much less likely to make their way to conflict areas such as Sudan, where human rights abuses are rampant. Rather than giving broad discretion to customs officials to grant licenses, the state should revise its license regulations according to international law and ensure that they are strictly enforced. This change would comport with the principles of the UN PoA, Sections II(2) and II(11), which recommend increased state oversight of arms exports. The change would also limit the discretion of officials to give licenses to arms shipments intended for conflict areas. Increasing the regulation of the export licensing process could also have the beneficial result of decreasing the number of bribes offered and accepted.

Second, Article 5 of the Regulations of the PRC on the Administration of Arms Exports should be amended. The three licensing principles that it contains, particularly Subsections (1) and (3), do not conform with international standards.¹⁹⁵ Subsection (1), which requires that arms shipments be useful to a country's self-defense, seems unnecessary and is not a primary concern in any of the international instruments that govern export norms. Subsection (3), which advocates a policy of non-interference, is potentially contradictory to international custom, which requires that exporting countries analyze the internal situation in the recipient country.¹⁹⁶ Subsection (2), which stipulates the need to support global and regional security, should remain in place and be supplemented by additional criteria. The Wassenaar Arrangement is a good source for the principles that should be included in China's potential revision of its export controls.¹⁹⁷ These

¹⁹⁵ See, e.g., Wassenaar Arrangement Guidelines, *supra* note 77.

¹⁹⁶ See *supra* Part III.A.4.

¹⁹⁷ See *supra* Part II.A.2.

criteria would decline licenses for arms shipments likely to prolong armed conflict, endanger stability, or violate human rights and suppress fundamental freedoms.¹⁹⁸

Third, to correct the vagueness and inconsistencies in its current licensing regulations, China could implement the Wassenaar “Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons.”¹⁹⁹ This document, which is an amendment to the original agreement establishing the Wassenaar Arrangement, provides an extensive list of questions to consider when deciding if a potential recipient of arms poses a high risk for instability or repression.²⁰⁰ Based on these criteria, the state could maintain an updated list of countries where conflict and instability produce a high danger that arms will be used to commit human rights violations. The implementation of this document would likely provide a human rights component to license approvals and would address some the vagueness problems in the current statute.

B. China Needs to Restrict Further Arms Shipments to Sudan

In addition to examining and revising its current export control regulations, China needs to immediately restrict the indiscriminate sale of arms to Sudan. China’s policy of non-interference in countries it trades with is putting China at risk of being found complicit to the crimes against humanity committed in Darfur.²⁰¹ China’s failure to acknowledge the human rights situation in Sudan is short-sighted. Not only does it put China in a precarious political position internationally, but it contributes to continued instability in Sudan. As a major investor in Sudan’s oil wealth, China should be concerned about the stability of the country and should not contribute to continued conflict there by providing weapons.

VIII. CONCLUSION

The global arms trade is a vital issue, and the international community has actively developed norms over the past decade to regulate this trade. The consistency and binding nature of these norms, as evidenced by general

¹⁹⁸ *Id.*

¹⁹⁹ Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, *Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons and Explanatory Note* (as amended December 2004), available at <http://www.wassenaar.org/guidelines/GuidelinesDocs/Objective%20analysis.doc>.

²⁰⁰ *Id.*

²⁰¹ See *supra* Part VI.B.

state usage and belief, is sufficient to make a case for the existence of a customary international law regarding arms exports. Specifically, this law requires that individual states implement and enforce comprehensive and specific export regulations on arms shipments. These regulations are intended to protect global security and human freedoms by preventing shipments to high risk areas.

China's shipment of arms to Sudan violates this international law. China's export regulations are too vague, do not specifically bar shipments to human rights violators, and are not adequately enforced. In addition, China is complicit in the humanitarian crimes being committed by Sudanese forces in Darfur. By supplying arms to a violent regime in an unstable region, with the full knowledge that the arms will likely be used in crimes against humanity, China is aiding and assisting Sudan in the commission of an internationally wrongful act.

Despite the financial value of China's oil investments in Sudan, China cannot afford to turn a blind eye to the severe human rights abuses in Darfur. It should immediately halt further shipments of arms to Sudan, in order to avoid complicity in the human rights crisis there. China should also reevaluate its foreign policy in this area, and focus on the long-term goal of global security and stability, rather than the short-term goal of obtaining cheap fuel. To this end, China should reform its export control regulations so that the state adequately manages the arms shipments leaving its borders, specifically by placing restrictions on licenses given to exports destined for conflict areas or inhumane regimes.